IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 144 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

BOARD OF TRUSTEES-KANDLA PORT TRUST

Versus

O N SHRIVASTAVA

Appearance:

MR SB VAKIL SR. ADVOCATE WITH MR SR BRAHMBHATT for Petitioners

MR JH TOLANI for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 26/10/1999

CAV JUDGMENT

This second appeal under section 100 of the Civil Procedure Code, 1908, is directed against the judgement and decree dated 26.2.1982 passed by the learned Assistant Judge, Kutch at Bhuj, in Regular Civil Appeal No.92 of 1979 arising from the judgement and decree dated 27.2.1979 passed by the learned Civil Judge (J.D.) at Bhachau in Regular Civil Suit No.49 of 1977.

Appellant no.1 is the Board of Trustees of the Kandla Port Trust (hereinafter referred to as the Board or Port Trust) which is a statutory board constituted under the Major Ports Trust Act, 1963. Appellants nos.2 to 4 are the Chairman, Secretary and Chief Engineer respectively of the Board. The appellants-original defendants have filed the present appeal against the judgements and decrees of the lower courts whereby suit of the respondent-plaintiff (employee of the Board) was decreed and termination order dated 9.3.1976 was declared to be illegal and null and void.

FACTS:-

2.0 The facts leading to filing of the suit briefly stated and as averred by the original plaintiff, are as under:-

2.1 The respondent-plaintiff was employed as a temporary Assistant Purchase Officer under the Port Trust with effect from 7.2.1973. The appointment was made as per the order dated 19.2.1973 (exh.62). He was appointed on probation for a period of two years. The probation period of two years as per the appointment order was due to expire on 6.2.1975. By order dated 6.2.1975 (Exh.63) the said period of probation was extended by three months i.e. up to 6.5.1975. The plaintiff was served with certain memos in Aug/Sept. 1975 because the petitioner had requested for leave on the ground of his father's illness. Since leave was not granted, all that the petitioner had done was to inform the superior that the petitioner would take legal action in the event of his father's death. The petitioner, however, tendered his apology. Thereafter by order dated 15.12.1975 (Exh.69) the probation period was extended by one year in the following terms:-

" The period of probation of Shri O.N.Shrivastava, Assistant Purchase Officer is extended by one year."

On 9.3.1976 defendant no.2 called the plaintiff in his chamber and asked the plaintiff to tender his resignation. The plaintiff declined and left the office at 1.30 PM after submitting the report for half-day's Casual Leave.

2.2 On 11.3.1976 the plaintiff filed Civil Suit No.33 of 1976 in the Court of the learned Civil Judge (Junior DIvision) Gandhidham contending that as per the statutory rules called Kandla Port Employees (Recruitment,

Seniority and Promotion) Rules, 1964 (hereinafter referred to as "the Recruitment Rules") the probation period cannot be for a period more than three years in the aggregate. Since the plaintiff had completed total period of three years on 6.2.1976, the plaintiff had acquired quasi-permanent status and the defendants cannot terminate the services of the plaintiff except for misconduct that too after holding a departmental enquiry. The threatened termination was also challenged on the ground that it was penal and the plaintiff was sought to be penalised for a couple of instances for which the plaintiff was not at fault.

2.3 On 11.3.1976 the learned Civil Judge passed the following order on the interim injunction application:-

"Upon motion made unto this Court by Shri V.R.Bheda, Advocate for the plaintiff supported with the affidavit and upon hearing the advocate of the plaintiff, this court doth order that an injunction be awarded to maintain status quo till 22.3.1976 and or to pass further orders till that date.

Given under my hand and seal this 11th day of March 1976.

Sd/- xx
Civil Judge (J.D.)
Gandhidham"

2.4 When the plaintiff reported for duty, he was not allowed to resume duty. The defendants resisted the suit and interim injunction application by filing written statement.

The defendants averred that the plaintiff was given an option to resign at 4 PM on 9.3.1976 and, therefore, the plaintiff intended to avoid service of the termination order and went away without permission. The plaintiff also left the headquarters and went to Bhuj from where he sent medical certificate to avoid service of the termination order although the defendants had tried their level best to serve the order of termination dated 9.3.1976 along with the cheque for one month's salary. As the plaintiff avoided service, the order could not be served on the plaintiff and the same should be deemed to have been served and taken effect from 9.3.1976. A copy of the termination order was produced by the defendants along with the reply to the interim injunction in the aforesaid Regular Civil Suit No.33 of 1976. The termination order dated 9.3.1976 (Exh.80 in

the present suit) read as under:-

"You are hereby informed that your services are no longer required by this port Trust. Therefore, in accordance with the terms of your temporary appointment, your services are hereby terminated with immediate effect on payment of one month's salary in lieu of notice. A cheque for Rs.1115/- being the amount of one month's salary is attached herewith."

2.5 When the plaintiff amended the plaint to contend that the termination order purporting to be dated 9.3.1976 was actually passed after the Civil Court granted ad-interim injunction on 11.3.1976 and was signed by the Chairman at Bombay, the defendants denied the said allegation and stated that the termination order was passed on 9.3.1976 at 5 PM and was sought to be served on the plaintiff in the evening of 9.3.1976 and morning of 10.3.1976 but the order could not be served as the plaintiff avoided the service.

2.6 Thereafter the said suit was withdrawn by the plaintiff for filing a fresh suit after service of statutory notice. The plaintiff then served the notice under section 120 of the Major Ports Act, 1963 containing allegations which are also contained in the plaint in the present suit. The defendants sent the reply to the said notice denying the various allegations. The plaintiff thereafter filed the fresh suit being the present suit i.e. Civil Suit No.49 of 1977 for the following reliefs:-

"(i) For a declaration that the plaintiff has acquired the status of quasi-permanent servant of the Kandla Port Trust and he is entitled to be continued in service and to receive the pay and salary and other allowances as admissible under the rules from time to time and that the order dated 9.3.1976 terminating his services is illegal, null and void.

(ii) For a declaration that the plaintiff was present on duty from 1.12.1975 to 11.12.1975, so the defendants are liable to pay Rs.385/- to him for his salary for the above period of 11 days.

(iii) For a permanent injunction restraining the defendants their servants and agents from terminating the services of the plaintiff or removing or dismissing him from the services of the plaintiff or removing or dismissing him from

the service without applying the provisions of services rules and regulations.

(iv) For a direction to the defendants that they should pay salary and other allowances to the plaintiff from the date of suit till final disposal of the same."

3 The defendant filed the written statement on 29.7.1976 contesting the said suit and denying the allegations made by the plaintiff. It was contended in the written statement as under:-

(i) The matter was covered by ordinary law of master and servant and therefore suit was barred under section 14 of the Specific Relief Act, 1963.

(ii) The plaintiff was never confirmed in service nor did he acquire any quasi-permanent status.

(iii) The plaintiff was a temporary employee after completion of the period of probation of 3 years from 6.2.1973. The plaintiff's services could be terminated by giving him one month's notice or notice pay as per Regulation No.5 of the KPT Employees (Temporary Services) Regulations, 1964.

(iv) The termination order dated 9.3.1976 did not cast any stigma on the plaintiff and therefore the same was not penal.

4. After considering the documentary and oral evidence on record the learned Civil Judge (JD) after holding that the present suit was maintainale decreed the suit in the following terms:-

(1) The plaintiff was declared to have acquired quasi-permanent status on 5.2.1976 and having continued as such in the service of the Port Trust, the termination order dated 9.3.1976 at exh.90 was declared to be illegal, null and void.

(2) The termination order purporting to be dated 9.3.1976 was not in existence on 9.3.1976, but it was created subsequently.

(3) Permanent injunction prohibiting the defendants from enforcing the aforesaid termination order and also passing any order of removal or dismissal against the plaintiff without due process of law was granted.

(4) The prayers for salary for the period from

1.11.1975 to 11.12.1975 and for the month of March 1976 were turned down.

5 Aggrieved by the aforesaid decree, the Port Trust filed Regular Civil Appeal No.92 of 1979 in the District Court at Bhuj. The plaintiff also filed cross objections claiming the salary for December 1975 and March 1976. During pendency of the appeal, the execution application No.1435 of 1979 filed by the plaintiff came to be stayed by the District Court in view of the following purshis dated 5.12.1979 signed by the parties and their respective advocates:-

" The defendants beg to submit that, as directed by the learned District Judge, Kachchh in Civil Regular Appeal No.92/1979 pending in the District Court, Kachchh, they will abide by the Decree that may ultimately be passed in this matter.

The Execution Application may kindly be stayed as directed by the learned District Judge, Kachchh under order dated 14.11.1979.

Gandhidham-Kutch Sd/- xxx
(S.L.Verma), Chairman
Kandla Port Trust
(Defendant No.2)

Sd/- xxx
(H.K.Assnani) For and on behalf of the
Chief Engineer Board of Trustees of the
Kandla Port Trust Port of Kandla (Kandla
(Deft. No.4) Port Trust)

Sd/-xxxx
(B S Barot)
Secretary
Kandla Port Trust
(Deft.No.1 & 3) "

6 After hearing the parties, the learned Assistant Judge partly allowed the appeal and set aside the declaration granted by the trial court that the plaintiff had become a quasi-permanent employee. The rest of the judgement and decree of the trial court was confirmed substantially including the finding given by the trial court that the termination order purporting to be dated 9.3.1976 was not in existence on 9.3.1976 and that it was passed subsequently. The learned Assistant Judge further held that no evidence was led to show that cheque for notice pay was issued held that the purported termination

of the petitioner's services without giving one month's notice or notice pay was illegal as it was violative of the relevant regulations. The plaintiff's cross objections were allowed and the defendants were also directed to pay the plaintiff salary for the month of March 1976.

It is for challenging the aforesaid judgement and decree dated 26.2.1982 of the District Court that the Port Trust and its Officers preferred the present Second Appeal. While admitting this appeal on 14.4.1982, this Court granted ad interim stay of operation and execution of the decree.

7 At the hearing of this appeal, the learned counsel for the appellant-defendants raised the following contentions:-

(1) The District Court, having already found in favour of the defendants that the plaintiff was a probationer and had not acquired quasi-permanent status on 9.3.1976, substantially erred in law in declaring the termination order to be illegal.

(2) The Courts below also substantially erred in holding that the termination order was in violation of Regulation 5(b) as the same purports to terminate the plaintiff's services forthwith without being accompanied by adequate payment.

(3) When the plaintiff had avoided service of the termination order and the cheque, the Courts below could not have given any finding in favour of the plaintiff.

(4) In any case, the plaintiff was not entitled to a declaration that he continued to be in service. There are no prayers sought in the plaint for reinstatement and back wages and the declaration sought is with respect to the date of institution of suit. The decree of the trial court also did not order any reinstatement or back wages. The plaintiff did not file any cross objections claiming reinstatement or back wages. Hence, the plaintiff by his conduct of avoiding service of the order prior to the institution of the suit and after obtaining the injuction from the trial court against his termination disentitled himself from obtaining the discretionary releif.

(5) The plaintiff is not entitled to permanent

injunction in vague terms such as permanent injunction not to terminate the services of the plaintiff without due process of law.

(6) In any view of the matter, after a long lapse of about 23 years, this Court may not pass any order of reinstatement.

The learned cousel for the appellant-defendants also relied upon various authorities in support of the aforesaid contentions.

8. On the other hand, the learned counsel for the respondent - original plaintiff made the following submissions:-

(1) The matter is not one pertaining to the law of master and servant but a matter between the Port Trust which is a statutory authority and its employee and the matter is covered by statutory regulations. Hence, Civil Court does have the power to declare the termination order to be illegal and to grant the consequential reliefs including reinstatement and back wages.

(2) Under Regulation No.8 the maximum period of probation is only three years and, therefore, after 6.2.1976 the defendants could not have terminated the services of the plaintiff by treating him as a probationer and without any inquiry.

(3) In any view of the mater, both the Courts have given a concurrent finding of fact that the termination order was not in existence on 9.3.1976 but it was antedated subsequently to get over the injunction dated 11.3.1976 for maintaining status quo. Hence, such a finding of fact should not be interfered with in this appeal under section 100 of the Civil Procedure Code.

(4) Even otherwise both the Courts below have given a concurrent finding that the impugned termination order was illegal as it was not accompanied by adequate payment of the plaintiff's dues. The Courts below even disbelieved the defendants' case that cheque for one month's salary was issued on 9.3.1976.

(5) The respondent-plaintiff, having been denied reinstatement on account of the interim stay granted by this Court at the instance of the

appellant-defendants, should not be denied the fruits of the decrees passed by the Courts below way back in 1979-1982 merely on account of the fact that the second appeal remained pending before this Court for 17 years.

The Status of the Plaintiff:-
Was he automatically confirmed in service?

9. The first question which is required to be decided is as to what was the status of the respondent-plaintiff on 9.3.1976.

9.1 As per the settled legal position the matter will be governed by the relevant service rules. In the instant case the relevant regulations are Regulations 8 and 9 of the Kandla Port Employees (Recruitment, Seniority & Promotion) Regulations 1964 framed by the Board of Trustees under Section 126 read with Section 128 of the Major Port Trusts Act, 1963. Regulations 8 and 9 of the said Regulations read as under:-

"8. PROBATION: (1) Every person appointed to a grade or post by direct recruitment, promotion or transfer shall be on probation for a period of two years from the date of his appointment.

(2) The period of probation may, if the appointing authority deems fit, be extended or curtailed in any case, but the total period of such extension or curtailment shall not, save where any extension is necessary by reason of any departmental or legal proceedings pending against the officer, exceed one year.

(3) During the period of probation any employee may be required to undergo such training and to pass such tests as the Board may, from time to time prescribe.

9. CONFIRMATION OF EMPLOYEES ON PROBATION:- When an employee appointed on probation to any grade or post has passed the prescribed tests and has completed his probation to the satisfaction of the appointing authority, he shall be eligible for confirmation in that grade or post subject to the availability of vacancy. Until an employee on probation is confirmed under this regulation or is discharged or reverted under regulation 10, he shall continue to have the status of an employee on probation."

9.2 The learned counsel for the respondent-plaintiff urged that since regulation 8(2) prescribes the maximum period of probation of one year over and above initial probationary period of two years, the petitioner became a confirmed employee of the Port Trust on completion of three years service i.e. on 6.2.1976. Hence, on 9.3.1976 the respondents could not have even purported to terminate the plaintiff's services without holding any inquiry. On the other hand, the learned counsel for the appellant-defendants urged that in view of the provisions of Regulation 9, the petitioner could not claim status of a confirmed employee since the plaintiff had not completed his probation to the satisfaction of the appointing authority and no order of confirmation was passed.

9.3 By now, several decisions have been rendered by the Apex Court on the question of probationer and deemed confirmation or otherwise and after reviewing almost all the decisions on this question in the case of Wasim Beg vs. State of U.P. in AIR 1998 SC 1291 the Apex Court has laid down the law as follows:-

"Whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question.

(1) In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary.

However, even when the Rules prescribe a maximum period of probation, if there is a further provision in the Rules for continuation of such probation beyond the maximum period, the Courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended.

(2) The other line of cases deals with Rules where there is no maximum period prescribed for

> probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period."

In view of the aforesaid clear analysis of the decided cases on the issue under consideration it is not necessary to refer to various other decisions cited by the learned counsel for the parties.

9.4 Applying the aforesaid principles to the regulations at hand it is clear that though regulation 8 prescribes the maximum period of probation as 3 years, Regulation 9 prevents automatic confirmation of an employee upon completion of 3 years of probationary period. The case would, therefore, fall in the class of cases falling under the exception to category (1) as discussed in the case of Wasim Beg (supra). Hence, it must be said that the learned Asst. Judge rightly held that the respondent-plaintiff had not acquired quasi permanent status on 9.3.1976.

Whether termination order was in existence and issued on 9.3.1976

10. The next question is whether even after holding that the plaintiff was a probationer the District Court substantially erred in law in declaring the termination order to be illegal. The facts of the case are quite bizarre and the appellant-defendants did not cover themselves with glory when even after the finding was given by the trial court that the impugned termination order purporting to be dated 9.3.1976 was not really issued till the trial court granted the ex parte ad interim injunction on 11.3.1976, the appellant-defendants seem to have made no effort to lead additional evidence before the District Court or this Court. The District Court has given finding of fact that the termination order purporting to be dated 9.3.1976 was not passed on 9.3.1976, but it was created subsequently and, therefore, on the basis of the same material which was before the courts below, in this appeal under Section 100 of the Code of Civil Procedure this Court would not interfere with the said finding of fact.

In Dnyanoba Bhavrao Shevade V/s M.S.Marnor (1999) 2 SCC 471 (478) the Hon'ble Supreme Court has observed as under:-

"The approach adopted by the learned Single Judge in the impugned judgement in para 12 to the effect that as both the courts below ignored the weight of prepondering circumstances and allowed their judgments to be influenced by inconsequential matters, the High Court would be justified in reappreciating the evidence and in coming to its own independent conclusions, is, to say the least, patently erroneous in law and cannot be sustained. Whether a finding of fact reached by the courts below is against the weight of evidence or not is a question which will remain in the realm of appreciation of evidence and does not project any question of law, much less, any substantial question of law, which can enable the High Court in second appeal to upset such a finding of fact."

So also in Ramanuja Naidu Vs. V Kanniah Naidu 1996 JT (3) SC 164, the Hon'ble Supreme Court has reiterated the following enunciation of law made earlier in M. Ramappa V. M. Bojjappa 1964 (2) SCR 673 in the following words of Gajendragadkar, J.

"The question about the limits of the powers conferred on the High Court in dealing with second appeal has been considered by High Courts in India and by the Privy Council on several occasions. One of the earliest pronouncements of the Privy Council on this point is to be found in the case of Mst. Durga Choudhrain. In the case of Deity Pattabhiramaswami v. S. Hanymayya, this Court had occasion to refer to the said decision of the Privy Council and it was constrained to observe that "notwithstanding such clear and authoritative pronouncements on the scope of the provisions of S.100 CPC, some learned Judges of the High Courts are disposing of second appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in litigation and confusion in the mind of the litigant public."

These telling observations made while considering the scope of the provisions of Section 100 of the CPC before the amendment in 1976 would apply with greater

vigor to the provisions of Section 100 after the amendment.

Whether alleged termination was accompanied by payment of notice pay:

11. The next question is what was the effect of the impugned termination not having been accompanied by valid payment.

11.1 Here again the finding given by the lower appellate Court is that there was no evidence to show that the defendants had not issued any cheque on 9.3.1976. In view of the decisions referred to in the preceding paragraphs, in this appeal under Section 100 this Court would not be in a position to interfere with the finding given by the courts below that impugned termination was not accompanied by a valid payment.

11.2 One of the conditions in the order appointing the plaintiff as a temporary Asst. Purchase Officer was as under:-

"His appointment wil be liable to termination at any time by giving in writing one month's notice by either side i.e. the appointee or the appointing authority. The appointing authority, however, reserves the right of terminating the service of the appointee at any time without notice or before the expiration of the stipulated period of notice, by making payment to him of a sum equivalent to the pay and allowances for the period of notice or the unexpired portion thereof as the case may be."

It was the case of the defendants before the Courts below right from the stage of filing the written statement in the suit that the plaintiff's services could be terminated by giving him one month's notice pay under Regulation 5 of the KPT Employees (Temporary Service) Regulations, 1964. The question of law that arises for consideration is interpretation of the said Regulation 5 which reads as under:-

"5. Termination of services of employees not in quasi-permanent service:-

(a) The service of a temporary employee, who is not in quasi-permanent service, shall be liable to termination at any time by notice in writing given either by the employee to the

appointing authority, or by the appointing authority to the employee.

(b) The period of such notice shall be one month unless otherwise agreed to by the appointing authority and by the employee.

Provided that the service of any suche employee may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice, or as the case may be, for the period by which such notice falls short of one month or any agreed longer period."

11.3 A similar rule came up for interpretation before the Apex Court in SR. SUPTD. RMS, COCHIN V/S K.V.GOPINATH in AIR 1972 SC 1487 and before a Division Bench of this Court in the case of SUB-DIVISIONAL SOIL CONSERVATION OFFICER & ANR. V. M.M.SAIYED 1990(1) GLH 518. In the said cases it was held that where necessary payment of notice pay has not been made with the order of termination, the order gets vitiated in law. It appears that there is considerable force in the contention urged on behalf of the plaintiff that the decision of the Apex Court in the case of RAJ KUMAR V/S UNION OF INDIA in (1975) 4 SCC 13 cited by the learned counsel for the appellants does not carry the appellants' case any further as the said judgement was rendered on review of the judgement reported at AIR 1975 SC 536 because the rule in question was amended and the amended rule was not brought to the notice of the Court. In that case it was pointed out that the amended proviso to sub-rule (5)(1)(b) read as under:-

" Provided that the services of any such Government servant may be terminated forthwith and on such termination the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of the services or as the case may be for the period by which such notice falls short of one month."

The amendment was made w.e.f. 1.5.1965 and therefore when the services of the employee in that case were terminated forthwith on 15.6.1971, the Court held that it was not obligatory to pay him the notice pay before the termination of the services and that the Government Servant concerned was entitled to claim sums mentioned. The Apex Court then observed that the decision of the Apex Court in Sr. Supdt. v. AIR 1972

SC 1487 was no longer good law in view of the fact that it was rendered without noticing the amendment.

11.4 Since the case of the appellants is that they have exercised the power under Regulation 5 of the KPT Employees (Temporary Service) Regulations, 1964, and since the proviso to Regulation 5(b) of the KPT Employees (Temporary Service) Regulations 1964 is not amended on the aforesaid lines as per the Central Govt. Rules, this Court will have to consider the effect of the proviso to Regulation 5 in KPT Regulations 1964. This Regulation is similar to Rule 33(1)(b) of the Bombay Civil Services rules, 1959 which reads as under:-

"33(1)(b) where the temporary Government servants has put in service for a period exceeding one year the period of such notice shall be one month and where such GOvt. servant has put in service for one year or any period less than on eyear the period of such notice shall be one week."

The above Rule came to be interpreted by a Division Bench of this Court in Sub-Divisional Soil Conservation Officer vs. M.M. Saiyed where this Court speaking through Hon'ble Mr Justice S.B. Majmudar (as His Lordship then was) held that where necessary payment of notice pay has not been made to the employee simultaneously with the impugned order of termination, the order gets vitiated in law.

11.5 Reliance placed by the learned counsel for hte appellants on the decisions in Bachi Ram v/s Union of India in 1986 Supp. SCC 179 and Union of India v. Arun Kumar Roy 1986(1) SCC 675 is of no avail to the appellants.

In Bachi Ram's case (Supra), the relevant service Regulation read as under:-

"12. Termination of services of an employee --
(1) The services of a temporary employee other than a probtaioner may be terminated by giving him one month's notice or salary in lieu thereof.
(2) The services of a permanent employee may be terminated by giving him three months' notice or salary in lieu thereof if he is declared medically unfit on account of any ailment which he develops while in service disabling him from discharging his normal duties or if the post is abolished."

The Apex Court, therefore, held that Regulation 12 did not contain any such stipulation as was found in the unamended proviso to Rule 5 (1)(b) of the Central GOvt (Temporary Service) Rules.

11.6 So also in the case of Arun Kumar Roy (Supra) the appointment of the employee was made on 30.7.1975 on probation for a period of 2 years and the probation period was extended by one more year. His services came to be terminated w.e.f.29.7.1978 as per the communication dated 22.7.1978 which also stated that the employee would be entitled to claim a sum equal to the amount of his pay plus allowances in lieu of one month's notice. The employee's petition challenging the termination order was allowed by a Division Bench of the Calcutta High Court. While reversing the said decision, the Apex Court considered the following two contentions:-

I " The respondent's counsel strongly pleaded that he was appointed to a substantive post since he was placed on probation. If his appointment was purely temporary it was not necessary to place him on probation. The case of the appellant on the other hand was that the order of appointment itself indicated that the respondent was appointed as a temporary hand and that he did not become a regular hand simply because he was put on probation. The termination in this case took place before the expiry of the extended period of probation which the authority concerned was entitled to do under the relevant rules."

The Apex Court rejected this contention of the respondent-employee in the following terms:-

" We find that the approach made by the Division Bench is not correct. We would first dispose of the contention raised by the respondent that he was not a temporary hand. The order of appointment itself makes it clear that he will be on probation for a period of two years which may be extended, if necessary. According to him, a temporary hand is not normally put on probation nor is probation extended in the case of temporary hands. The fact that he was originally put on probation for a period of two years which was extended by one year itself indicates according to him that he is not a temporary hand. This contention need not detain us for long. The appointment order makes it

clear that the appointment will be on a temporary basis. The mere fact that he was put on probation does not ipso facto make the appointment any the less temporary and for that reason his extended probation also. Unless the respondent makes out a case based on some rules which requires confirmation to a post on the expiry of the period of probation, he cannot succeed on the mere ground of his being put on probation for a period of two years or by the fact that his probation was extended."

II. The contention that the termination order was bad because notice pay was not simultaneously paid was rejected on the ground that the respondent was appointed on 30.7.1975 and Rule 5(1)(b) of the Central Civil Servants (Temporary Service) Rules was amended in 1971 with retrospective effect from 1.5.1965. The amended RUle thereof applied in the case.

RELIEFS TO BE GRANTED

12.0 The above discussion does not resolve the controversy because the matter is also debated on the reliefs to be granted to be respondent-plaintiff.

12.1 The learned counsel for the appellant-defendants vehemently urged that on the one hand the respondent plaintiff had obtained a permanent interim injunction against terminating the plaintiff's services without following the due process of law and that such a vague and omnibus injunction could not have been granted by the trial court. If at all it would mean anything it only meant that the plaintiff's services were not terminated or were not validly terminated between 9.3.1976 and the date of filing of the first suit i.e. dated 11.3.1976 but it could not mean that the plaintiff would continue to remain in service on the strength of the injunction order for all time to come over the last 23 years.

12.2 On the other hand, the learned counsel for the repsondent-plaintiff urged that since the trial court as well as the lower appellate court have given finding of fact that the termination order was not in existence on 9.3.1976 and that even otherwise the impugned termination order was not accompanied by adequate payment of plaintiff's dues, as held by both the courts below, the appellant-defendants must suffer the consequences and the plaintiff cannot be denied his legitimate benefits flowing from the declaration granted by the courts below.

12.3 The Court is, therefore, required to consider whether notwithstanding the findings of fact given by the Courts below in favour of the plaintiff which findings are not being disturbed by this Court, whether the plaintiff should be denied the declaration that the plaintiff continued in service and is entitled to get all consequential benefits including reinstatement and back wages. It is vehemently submitted by the learned counsel for the appellant-defendants that since the plaintiff avoided termination order and since the trial court had also not passed any decree for reinstatement or back wages nor the plaintiff had filed any cross objections before the District Court or this Court claiming reinstatement or backwages, no relief deserves to be granted.

12.4 When declaration was already granted by the trial court and confirmed by the lower appellate court that there was no termination order in existence on 9.3.1976 and admittedly no other order was passed after 9.3.1976, the consequence was that the plaintiff continued in service and, therefore, he is entitled to get all the consequential benefits of that declaration. The question of praying for back wages may arise only for the period prior to the date of filing of the suit and for the salary for the period from the date of filing of the suit till the date of disposal the plaintiff had prayed in the suit and no Court Fee stamp is required to be affixed for the payment of the salary during the pendency of the suit. Everything will depend on the declaration that will be given by the Court and the terms in which the releifs will be moulded. The defendants took their chance of succeeding in the second appeal and prayed for interim stay of the operation and execution of the decree of the lower appellate court with which the decree of the trial court had merged. Even when such an interim stay was granted the defendants did not seek any liberty to pass appropriate orders for terminating the plaintiff's services without prejudice to the rights and contentions of the appellants in this appeal. The appeal has been heard after a period of 17 years and total period of 23 years has elapsed between the date of the filing of the suit and the date of hearing of this appeal and, therefore, once the declaration was granted by the lower courts, the plaintiff is entitled to all the consequential benefits.

12.5 It, however, appears to the Court that when a period of 23 years has already elapsed, an order of reinstatement would not be a proper relief to be granted

more particularly when the petitioner was not a mere clerk but an officer who has remained out of office for the last 23 years. Passing an order of reinstatement at this stage and then permitting the defendants to terminate the services of the respondent-plaintiff afresh would not serve the ends of justice. So also, an order for granting the respondent-plaintiff all the consequential benefits such as full salary and allowances for the entire period of 23 years would not be justified as the plaintiff might have taken up some gainful employment to maintain his family over all these years. Of course, there is nothing on record to show that the plaintiff had taken up any gainful employment during the last 23 years. Keeping the aforesaid considerations in mind and in order to see that neither of the parties is required to bear the entire burden of pendency of this litigation over the last 23 years, particularly, for the pendency of the Second Appeal over the last 17 years and further any direction for payment of a particular percentage of back wages would again warrant fixation of the salary for the last about 23 years with revisions from time to time and varying allowances over this period and then by slashing it by a particular percentage and considering the fact that the plaintiff was an officer with the Port Trust, this Court is of the view that payment of a lump sum amount in the sum of Rs.2.50 lakhs (Rupees Two Lakhs Fifty Thousand Only) would be just and proper as the amount in lieu of all the releifs including reinstatement, back wages and all service benefits for the entire period of the litigation between the parties.

13 The appeal is accordingly dismissed with the modification of the decree under appeal to the effect that even while not interfering with the findings given by the lower appellate Court this Court directs that in lieu of all the releifs prayed for by, and granted or grantable to, the respondent-plaintiff, the appellant-Board shall pay the respondent - plaintiff a sum of Rs.2.50 lakhs (Rupees two lakhs fifty thousand only) and the respondent-plaintiff shall not be entitled to reinstatement or any other benefit. The payment of the aforesaid amount of Rs.2.50 lakhs shall be made by the appellant-board within one month from today. If the amount is not paid within one month from today, it will carry interest at the rate of 12% per annum from today till the date of payment.

The appeal is accordingly disposed of in the aforesaid terms. There shall be no order as to costs of this appeal.

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